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No. 01-1174

Supreme Court, U.S.
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In The

Supreme Court of the United States

BALBIR SINGH TULI,

Petitioner,

vs.

SPRECHER ENERGIE A.G.;
SPRECHER + SCHUH GROUP,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY BRIEF

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Pro Se Petitioner
as the representative of his Chapter 11
Bankruptcy Estate retained by his confirmed
Plan of Reorganization

14pp

QUESTIONS PRESENTED FOR REVIEW
(Re: Respondents' Brief)

1. Whether questions 1 and 2 presented by respondents' Brief for review are misfounded?

2. Whether the issues raised by respondents' Brief are frivolous on the face of the record?

3. Whether issues now raised by respondents' Brief, not decided by the Court of Appeals, need not be decided by the Supreme Court?

4. Whether respondents be estopped under the doctrines of judicial or equitable estoppel, from taking positions inconsistent with those taken below?

5. Whether respondents' Brief should be stricken for misstatements, especially of the "undisputed background facts" noted by the BAP in Memorandum of 6/9/99 (RA 8)?

6. Whether respondents' Brief misstates the effect of the two orders (dismissal without prejudice of adversary proceeding, and withdrawal of filed Proofs of Claim) not appealed to the Supreme Court, as time-barring petitioner's claims and rendering the petition for a writ of certiorari moot?

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I. RESPONDENTS' QUESTION NUMBER 1, IS MISFOUNDED.

1. In the Court of Appeals, respondents sought affirmation of Bankruptcy Court's addition of "carve-out" language in Amended Order Confirming Plan (Dkt. 383) on the following basis on which Bankruptcy Appellate Panel earlier affirmed it, i.e., the impact of 11 U.S.C. § 553(a) on § 1141(c), based on the Court of Appeals' prior interpretation in *In re De Laurentiis Entm't Group Inc.*, 963 F.2d 1269, 1275, 1276 (9th Cir.1992), and its conclusion that "section 553 must take precedence over section 1141," in answering the question presented by that case, i.e., "We must decide which of the two Code sections [553(a) and 1141(c)] controls [after confirmation of chapter 11 plan]." The Court of Appeals in its decision (Item 3, RA 3-4) in this case, accepted the following basis argued by respondents in their Brief at 25 and, based solely thereon, affirmed the carve-out:

> Relying upon the Ninth Circuit's holding in [In re] *De Laurentiis*, the BAP held that Bankruptcy Code *§ 553(a) automatically preserved the right the Alstom Group had to setoff their claims against amounts Debtor asserts they owe him.* It further held that the *Bankruptcy Court's addition of language* providing that Debtor's discharge "does not cover Appellee's claims, and that the claims by and against Debtor are preserved, *merely clarified the effect of § 553(a) on the claims of these parties.*"

Alstom's Brief in Court of Appeals, at 25. Also stating in footnote 5, as follows, in the Brief at 25:

> Because the language of the amended order confirming the plan could be read to preserve claims against Debtor personally, counsel for all appellees [respondents], at the request of the BAP, have stipulated that the "carveout" language should be interpreted as reserving only their right, if any, to setoff and not as including any right to affirmative relief against Debtor.

2. The Court of Appeals' decision in this case (Item 3, RA 3-4, Memorandum) treats the carve-out language in Order Confirming Plan, as a mere clarification of the impact of 11 U.S.C. § 553(a) as interpreted by it in *In re De Laurentiis* case, as follows:

> Defendants moved to amend the Order [Confirming Plan] *to clarify that,* if Plaintiff eventually recovers damages under the Iraqi subcontracts, then *Defendants' claims for setoffs* against those damages *are preserved. The Court made that amendment,* which Plaintiff now disputes. Specifically, he argues that any setoff was discharged automatically when the plan was confirmed. To the contrary, *this court has held that, under 11 U.S.C. § 553(a), pre-petition rights to a setoff (like those that Defendants assert here) survive the general discharge of debts that occurs, under 11 U.S.C. § 1141, when a plan is confirmed. Carolco Television, Inc. v. Nat'l Broad. Co. (In re De Laurentiis Entm't Group, Inc.),* 963 F.2d 1269, 1276 (9th Cir.1992).

Memorandum of Court of Appeals, RA 3-4, Item 3.

3. Therefore, on the facts of this case, the carve-out language in the Amended Order Confirming Plan "merely clarified the effect of § 553(a) on the claims of these parties," as argued by respondents in the Court of Appeals, based on this basis of affirmation by the BAP.

4. To the contrary, Question No. 1 raised by respondents to question the appropriateness of this case for resolving conflict between the Third and the Ninth Circuits in dealing with the tension between 11 U.S.C. §§ 553(a) and 1141(c), wrongly views the carve-out language in Order confirming plan as not merely a clarification of impact of § 553(a) on effect of plan confirmation under § 1141, but as exception to the effect of plan confirmation under the discretionary power of bankruptcy court.

5. Question No. 1 is not only misfounded, but also misleading and clearly frivolous.

6. Moreover, in their attempt to push this frivolous contention, respondents try to make a case which was

never their case in the courts below, by their now abandoning "setoff" which they claimed in courts below, and invoking "recoupment" in this Court for the first time by misstatement of even "the undisputed background facts," to which footnote 4 at RA 8 (Memorandum of the BAP, dated June 9, 1999) refers, as shown in II, below.

7. Respondents are thus raising issues on which the Court of Appeals did not pass, and this Court need not decide here issues not decided below, and may decline. *Green Tree Financial Corp. v. Randolph*, 121 S.Ct. 513, 523, n. 7 (2000) ("The Court of Appeals did not pass on this question, and we need not decide here issues not decided below."). In any event, the doctrine of recoupment is inapplicable because in the Claim stated by Alstom's predecessor in the 1984 letter referred to in undisputed background facts noted by the BAP, including present claim of setoff of its admitted indebtedness of specific amounts of cash security money and progress payment due petitioner's predecessor for work performed and approved and accepted by the client on different projects and under different contracts against consolidated claim of damages pertaining to four projects under the two subcontracts, which is clear from the said undisputed facts read with disclosures in First Amended Disclosure Statement, pp.11-21 (Dkt. 167), Ex.4 thereto referred to by the BAP in the undisputed facts, including petitioner's declaration under penalty of perjury on p.21 thereof, as to the truth of the facts stated in it.

8. Alstom by referring to its predecessor's above-said 1984 letter making a claim to setoff, opposed turnover of admitted dues of petitioner in the bankruptcy court by their pleading (Adv.dkt. 100), claiming setoff right under 11 U.S.C. § 553, as under:

> [A]s obvious on the face of the February 27, 1984 letter, Sprecher Energie has counterclaims against Consort that far exceed the allegedly "admitted" portion of Tuli's claim. Under Section 553 of the [Bankruptcy] Code, Sprecher

> Energie is entitled to setoff against Consort, his purported assignor.

Respondents' claim of right to setoff (Adv.dkt. 100).

9. Respondents admit on bankruptcy court's record that determination of the said setoff claim against the dues of petitioner under the two contracts, is critical to the rehabilitation through reorganization of Tuli and Consort in their Chapter 11 proceedings, as under:

> Lastly and most importantly, the alleged assignment and settlement of purported Consort claim against GEC Alsthom [now "Alstom"] is critical to both chapter 11 bankruptcy proceedings.

Respondents' Motion to transfer Consort's case (Dkt. 295).

10. Alstom asserts claim to setoff Tuli's claim to work dues being the major means of rehabilitation of Tuli and Consort's reorganization/payment of creditors, under the Confirmed Plan of Reorganization (A 33). And contrary to the provisions of ¶¶ 7.0.5 and 14.01 of confirmed Plan (A 33), respondents' Brief at 8-9 says that the post-confirmation assertion of setoff right by them does not have probability of disrupting the plan of reorganization or possibility of unnecessarily delaying bankruptcy proceedings and consuming judicial resources or being unfair to other creditors and the debtor. Assertion of setoff claim post-confirmation is disruptive to Plan.

II. RESPONDENTS' BRIEF MISSTATES "UNDISPUTED FACTS" STATED IN BAP MEMORANDUM AS "FACTS" (RA 8-10).

11. Footnote 4 to the BAP Memorandum of 6/9/99 (RA 8) refers to following "undisputed" FACTS:

> Alstom then entered into *two subcontracts* with Consort for performance of civil work on the *projects*. . . . Work commenced on the *projects* . . . Alstom ordered Consort off the job because of *alleged defects* in performance. In a *letter dated February 27, 1984, Alstom set out its understanding of the sums that were due to Consort*

> *for Consort's work and also the sums it asserted Consort owed it* for alleged breaches of contract. (Ex. 4 to debtor's First Amended Disclosure Statement). Alstom claimed contract damages that exceeded *the amount Alstom indicated it owed to Consort.* At some point, Consort assigned its claims against Alstom to debtor. Despite debtor's demand, *Alstom has not paid the amounts set out in the 1984 letter, because it asserts that any amounts it owes Consort are more than offset by amounts it alleges Consort owes* for Consort's breach of contract. . . . In December 1992, . . . debtor *commenced adversary proceeding* No. 92-1330 in bankruptcy court . . . *seeking turnover of the amounts set out in Alstom's 1984 letter, pursuant to § 542 [of Bankruptcy Code],* as well as additional amounts as damages for alleged breach of the *subcontracts. He claims turnover for amounts he asserts are undisputed, and which he claims exceed the amount of any setoff Alstom might have.* . . . In mid-December, [1996] he filed two proofs of claim in the bankruptcy case on behalf of Alstom, asserting claims for setoff against the amounts debtor asserts Alstom owes him for the work Consort did on Iraqi *projects.* In February 1997, the court dismissed the adversary proceeding without prejudice. It also granted Alstom's motion to withdraw the proofs of claim that debtor had filed on Alstom's behalf and denied debtor's motion to reconsider that ruling.

III. RESPONDENTS' QUESTION NUMBER 2 IS MISFOUNDED; THEY MISSTATE EFFECT OF UNAPPEALED ORDERS.

12. The effect of the two orders, stated by the BAP in its Memorandum of 6/9/99 (RA 8), is as follows:

> The result of the court's orders was to require that any adjudication of that dispute take place in arbitration or in a court other than the bankruptcy court.

13. The above statement of the BAP is based on the following orders of the bankruptcy court, as also the grounds taken by Alstom to obtain withdrawal of proofs of claim and to oppose vacation of stay:

> . . . ORDERED that the above-captioned adversary proceeding and all actions relative thereto are stayed pending arbitration of *the parties' claims* by the International Chamber of Commerce. (Order dt. 4/21/94, Adv.dkt. 103). This court again concludes that these disputes should be arbitrated. Further the court also concludes that "in the interest of justice" as that term is used in Section 1334(c)(1) [28 U.S.C.] this court should abstain from hearing these disputes thereby *allowing these parties, including the debtor, to litigate their claims in whatever court may have jurisdiction over them.* Therefore, this adversary proceeding should be dismissed, without prejudice. (Order dt. 1/10/97, Adv.dkt. 133) IT IS ORDERED that the Proofs of Claims filed by the Debtor on behalf of GEC Alsthom are withdrawn. (Order dated April 27, 1999 on Alstom's Motion to withdraw.). On January 10, 1997, the Court entered the Minute Entry/Order in Adversary No. 92-1330, which dismissed the adversary proceeding and concluded that the disputes summarized below should be arbitrated/litigated in whatever court, other than this Bankruptcy Court, that may have jurisdiction over them. . . . Tuli should not be permitted to do indirectly that which this Court has prohibited Tuli from doing directly.

Alstom's motion to withdraw Proofs of Claim. (Dkt. 246).

14. On exactly the same ground Alstom opposed Tuli's motions to: (1) vacate stay of turnover proceeding under 11 U.S.C. § 542; (2) enter summary judgment to turnover sum admittedly due, but held because of claim of damages sought to be set-off; and (3) allow referral to arbitration or mediation to settle under 11 U.S.C. § 1123(B)(3)(A) provided in then proposed Plan. (Objection, Adv.dkt. 139).

15. Because the Court of Appeals has affirmed dismissal without prejudice, of Tuli's estate's said Adversary Proceeding, not on the basis of abstention but on alternative ground of "failure to prosecute" (RA 3) for the delay in filing motion to vacate stay of the adversary proceeding, abstention from the turnover proceeding is not effective.

16. Therefore, the result of the said two orders, which have not been appealed to this Court, is to require that any adjudication of the parties' claims pertaining to the turnover proceeding (covered by the adversary proceeding dismissed without prejudice, and the Proofs of Claim that were withdrawn without prejudice) take place in arbitration or in any court, including the bankruptcy court, having jurisdiction over them. However, in respect of bankruptcy court's abstention from adversary proceeding other than the turnover proceeding under 11 U.S.C. § 542, forming part of the proceeding, Tuli did not appeal from that part, and the effect of the said two orders stated by BAP remains unchanged. The Ninth Circuit's affirmation of dismissal without prejudice of adversary proceeding (RA 2-3) for failure to prosecute, as an independent and alternative ground (with abstention as the other basis of dismissal without prejudice), applies only to the turnover part of the adversary proceeding. Dismissal without prejudice, of the part of the adversary proceeding (other than turnover proceeding under 11 U.S.C. § 542) on the independent and alternative basis of abstention, has the effect of staying federal as well as the state law part of the adversary proceeding until after the adjudication of the state law part in any court other than the bankruptcy court. This is based on *Moses H. Cone Mem. Hosp. v. Mercury Construction Corp.*, 460 U.S. 1, 8-13, nn. 8, 11, 103 S.Ct. 927, 933-935, & nn. 8, 11, 74 L.Ed.2d 765 (1983). In footnote 8, this Court stated:

> This oddity [because Pullman abstention is implemented in 49 states by a stay, and only in Texas by dismissal] illustrates the artificiality of

> resting appealability on an otherwise *substanceless distinction between stays and dismissal in the present [abstention] context.*

Also, *England v. Louisiana State Bd. of Med. Exam.*, 375 U.S. 411, 84 S.Ct. 461 (1964) (*Abstention does not involve abdication of federal jurisdiction, but only postponement of its exercise. Abstention doctrine does not require a party to litigate its federal claims in state courts.*)

17. *Alstom has admitted this effect of dismissal without prejudice* in the context of abstention from state law part of the adversary proceeding, *as follows*, in its Reply to Tuli's response to Alstom's motion to dismiss BAP Appeal #AZ-97-1124, filed 4/2/99 in Bankruptcy Appellate Panel (BAP dkt. 61), on page 5, lines 21-23:

> In this case, *the bankruptcy court dismissed Tuli's adversary proceeding without prejudice to Tuli reinstating it after completing arbitration [or litigation in any court other than the bankruptcy court]* before the ICC.

18. Petitioner has relied on the above effect of dismissal of state law part of the adversary proceeding, without prejudice, stated by Alstom before BAP, and has not appealed from orders dismissing adversary proceeding and withdrawing Proofs of Claims, without prejudice (Adv.dkt. 133, and Case dkt. 402, respectively), because, according to Alstom, dismissal without prejudice is without prejudice to Tuli reinstating it after adjudication of state law claims in any court other than bankruptcy court, or in arbitration, alternatively, consistent with Alstom's position stated in its Objection to vacate stay of turnover proceeding and entry of summary judgment in respect of admitted dues of Tuli's predecessor Consort, as well as Alstom's position in its Motion to withdraw Proofs of Claims (Adv.dkts. 139, 246, respectively), which is:

> On January 10, 1997, the Court entered the attached Minute Entry/Order [Adv.dkt. 133] in Adversary No. 92-01330, which *dismissed this adversary proceeding* in the interest of justice under 28 U.S.C. § 1334(c)(1) *and concluded that the alleged disputes should be arbitrated/litigated in*

> *whatever court, other than this Bankruptcy Court,* that may have jurisdiction over them.

Alstom's Objection, Adv.dkt. 139, and Motion, Adv.dkt. 246.

IV. PETITIONER'S RETAINED CHAPTER 11 ESTATE'S FEDERAL AND STATE LAW CLAIMS ARE NOT TIME-BARRED.

19. In view of respondents' admission of what petitioner has also independently arrived at above, and petitioner's reliance thereon in not appealing from the court of appeals' affirmance of bankruptcy court's order dismissing adversary proceeding No. 92-1330, without prejudice (Adv.dkt. 133), that the dismissal is without prejudice to petitioner reinstating it after arbitration or litigation in any court other than bankruptcy court of the state law claims, for bankruptcy court to deal with petitioner's federal law claims, and in view of the following reasons additionally, neither federal law nor state law claims of petitioner's estate retained by confirmed plan of reorganization (RA 33), are time-barred.

20. Moreover, even before the court of appeals issue of mandate on August 30, 2001, on 02/02/99 petitioner filed notice of renewal of adversary proceeding and Motion to Reinstate (Adv.dkt. 160), and again on 08/15/01 (Adv.dkt. 170) he renewed it.

21. Respondents have waived their statute of limitation defense by not properly relying on Arizona Revised Statute (A.R.S.) § 12-552, by withholding relevant part, § 12-552(G), which provides:

> With respect to an improvement to real property that was substantially complete on or before September 15, 1989, the eight and nine-year periods established in subsection A and B of this section shall begin to run on September 15, 1989. Notwithstanding the provisions of subsection E of this section and § 12-505, subsection A, this subsection applies to claims that accrued before

> the effective date of this amendment to this section.

Hence, the eight-year period should have commenced Sept. 15, 1989, but because of the tolling effect of A.R.S. § 12-501, the statute of limitation did not start until November 20, 1991, when Order for relief under chapter 11 was entered (Case dkt. 25) and under the federal jurisdiction process could be served on respondents outside the territory of Arizona, but until they voluntarily appeared in the bankruptcy court on Oct. 11, 1994, in chapter 11 case of petitioner, they disputed proper service on the Swiss respondent, Alstom who is the main party to the adversary proceeding. Hence, until October 11, 1994, Alstom AG was absent from Arizona in terms of A.R.S. § 12-501. So the 8 year statute (§ 12-552) commenced from 10/11/94 and cannot expire prior to 10/11/2002. Moreover, for suing Alstom or arbitration against it in Switzerland the Swiss statute of prescription (Art. 127), Swiss Code of Obligations, is ten (10) years, and is interrupted when bankruptcy petition was commenced in Arizona on Sept. 11, 1991, and has since been interrupted, commencing a fresh 10 years period, with each act relating to the bankruptcy case, including adversary proceeding, under Arts. 135, 137, 138. Swiss Code of Obligations, Simon L. Goren, Fred B. Rothman & Co., Littleton, CO 1987.

CONCLUSION

In view of misfounded and frivolous position of respondents, and the great importance of the question(s) presented in the petition both for rehabilitation of petitioner and his alter ego Consort and for payment of creditors, to implement confirmed plan of reorganization, as also for fulfillment of purposes of chapter 11, petitioner prays as the representative of his retained estate, for grant of the petition.

April 1, 2002

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